

APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In re Application of

TEMPO SATELLITE, INC.,
Assignor,

and

DIRECTV ENTERPRISES, INC.,
Assignee,

For Consent to Assign Authorization to
Construct, Launch and Operate a Direct
Broadcast Satellite System Using 11 Frequencies
at the 119° W.L. Orbital Location.

File No. SAT-ASG-19990127-00014

To: The Commission

PETITION TO DENY

EchoStar Communications Corporation ("EchoStar") hereby petitions to deny the above-captioned application, in which DirecTV Enterprises, Inc. ("DirecTV") proposes to acquire the authorization of Tempo Satellite, Inc. ("Tempo") for eleven DBS channels at the 119° W.L. orbital location.¹ EchoStar operates two sixteen-transponder satellites at that orbital

¹ See Public Notice, Rpt. No. SBP-147 (Feb. 1, 1999). EchoStar is a party in interest under 47 U.S.C. § 309(d) as a competitor of DirecTV and Tempo that would be directly harmed by DirecTV's proposal to acquire an authorization for eleven DBS channels at an orbital location where EchoStar operates two satellites. The proposed acquisition would prevent EchoStar from using more than a third of those satellites' capacity to provide service to the U.S. public and more effectively compete in the Multichannel Video Programming Distribution market.

location, but its operation is limited to twenty-one DBS channels because of the Tempo authorization sought to be assigned in this proceeding.

EchoStar welcomes competition in the MVPD market from wherever it comes. Thus, the record in this and other proceedings leaves no doubt that DBS providers should be allowed access to two full-CONUS orbital locations to ensure the capacity necessary to compete against cable operators and new delivery systems for video, audio and data, such as will result from the AT&T/TCI merger. For this reason, EchoStar has not opposed DirecTV's proposed acquisition of United States Satellite Broadcasting Company, Inc., which is assigned spectrum at 101° W.L. and 110° W.L. However, the Commission should not permit a single operator to use spectrum at all three full-CONUS orbital locations. The use of two adjacent full-CONUS slots allows an efficient and attractive MVPD offering. Two slots can be put to productive use by a comparatively modest satellite configuration. Furthermore, two full-CONUS locations can be accessed through a consumer-friendly one-dish installation. Accordingly, the use of spectrum at two full-CONUS orbital locations allows the creation of a vigorous product that can compete against cable on a more equal footing – indeed, it is necessary for such competition to develop.

On the other hand, the use of all three full-CONUS locations requires a comparatively substantial fleet of less-efficiently deployed satellites. For example, in order to provide service from the Tempo and USSB slots it proposes to acquire, DirecTV would have to deploy at least one satellite at 119° W.L. and one satellite at 110° in addition to its three satellites currently operating at 101° W.L. These satellites would be inefficiently utilized (only a small

portion of the capacity on each would be used).² That inefficiency raises some doubts as to whether the huge investment required for the deployment of these satellites can be justified based solely on pro-competitive, service considerations. It raises the possibility that one important benefit of such deployment is to keep the other operators assigned spectrum at the same orbital location from using the remaining channels.

Moreover, until a dish viewing all three orbital full-CONUS locations becomes a reality, access to all of these locations is likely to be less important to creating more effective competition to cable.³ Accordingly, until a so-called "triple feed" dish becomes available, a three-slot offering will require the use of multiple dishes.⁴

² Tempo itself has admitted that "the eleven channels it has been assigned 'are not sufficient for a competitive system.'" See *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd. 9712, 9765 (1995)(footnote and citation omitted).

³ DirecTV admits that a "consumer-friendly single-dish receiving system capable of receiving programming from *three* separate locations. . . ." is only "in the planning stages." Application at Exhibit E, p.5.

⁴ EchoStar has had to offer a two-dish solution to complement its full-CONUS offering with services from its satellites at 61.5° W.L. and 148° W.L. That experience has been mixed. EchoStar has encountered substantial consumer resistance to the perceived difficulties of installing and maintaining second dishes. See, e.g., Opposition of EchoStar Communications Corporation to *Ex Parte* Submissions in File No. 106-SAT-AL-97 at 24 n.43 ("As a 'second-best' solution to this problem of orbital scarcity, EchoStar has been offering limited local-into-local service through the use of half-CONUS satellite capacity. This requires the use of multiple dishes, and will thereby be more difficult to market as a convenient alternative to cable."); Application of MCI Telecommunications Corporation and EchoStar 110 Corporation in File No. SAT-ASG-19981202-0093 at 15 ("EchoStar currently offers local programming through its satellites at 61.5° W.L. and 148° W.L. This arrangement unfortunately, requires customers to install a second dish in order to receive local programming. While some customers have embraced the two-dish system, others have found it to be cumbersome and difficult, despite EchoStar's offer to install the second dish free of charge. To date, the two dish solution has not proven to be a particularly attractive alternative to cable.") (citations omitted).

In view of these inefficiencies and less-accessible consumer offering, it seems at least possible that the motive underlying such a "three-slot" plan could be to try to marginalize the operator using the remaining spectrum at those locations, pushing it to a niche strategy of product differentiation and preventing it from competing against cable operators head-to-head on price. Such a result would compromise the cause of competition in the MVPD market, and the Commission should avoid it.

EchoStar hereby apprises the Commission that it has recently announced it is ready, willing and able to make an offer to pay \$600 million (including assumed liabilities) to Primestar in exchange for two satellites and certain rights of Primestar to use Tempo's authorizations (provided that such a transaction would not breach any contract to which Primestar or any of its affiliates are a party or by which they are otherwise bound). In light of the uncertainty as to who will ultimately acquire the rights to the Tempo spectrum, the Commission should wait until that issue is finally determined prior to reaching a conclusion on the DirecTV application, which could ultimately be mooted as a result of the EchoStar interest.

In evaluating the proposed assignment, the Commission should also assess several concerns regarding Tempo's diligence. Among other things, in several other pleadings, incorporated here by reference, EchoStar has argued that the primary purpose underlying Tempo's behavior appears to have been to prevent EchoStar from using these 11 channels with its two 16-transponder satellites located at 119° W.L.⁵

⁵ See Consolidated Applications for Special Temporary Authority in File Nos. 92/93-SAT-STA-97 (filed July 18, 1997); Comments of EchoStar Communications Corporation in File Nos. 106-SAT-AL-97, 91-SAT-TC-97 (filed May 7, 1998) (commenting on certain confidential material submitted by Primestar and its cable affiliates).

CONCLUSION

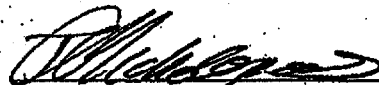
For the foregoing reasons, EchoStar respectfully requests that the Commission deny the above-captioned application.

Respectfully Submitted,

EchoStar Communications Corporation

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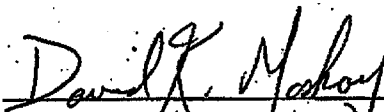
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Its Attorneys

Dated: March 5, 1999

DECLARATION

I, David K. Moskowitz, hereby declare under penalty of perjury that the foregoing
is true and correct.



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Date: March 5, 1999

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 1999, I caused the foregoing pleading to be served by hand delivery to the following persons:

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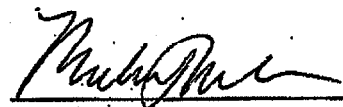
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